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89-383

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

LARRY RAY HANSON,
Petitioner,

vs.

PETER N. ARROWSMITH, M.D.; PETER N. ARROWSMITH, M.D., P.C.; AND ARROWSMITH EYE INSTITUTE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEVEN A. RILEY
(*Counsel of Record*)
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238
615/742-6200
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED FOR REVIEW

Whether the district court's failure to dismiss alternate jurors before deliberations as required by Fed. R. Civ. P. 47(b) constitutes reversible error?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 872 F.2d 745. It is printed in Appendix A hereto at page A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 14, 1989. A timely petition for rehearing was denied on June 6, 1989. This petition has been filed within ninety days of that date. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2072, the statute authorizing the promulgation of the Federal Rules of Civil Procedure, provides in pertinent part: "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

RULES INVOLVED

Fed. R. Civ. P. 47(b), adopted pursuant to 28 U.S.C. § 2072, states in pertinent part:

> Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. *An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.*

(Emphasis added).

Rule 12(j) of the Local Rules of Court for the Middle District of Tennessee provides that "[a]ll civil juries shall be composed of six (6) persons, *excluding alternates.*" (Emphasis added).

STATEMENT OF THE CASE

Petitioner Larry Ray Hanson filed this medical malpractice action in the United States District Court for the Middle District of Tennessee against Parkside Surgery Center ("Parkside") and Dr. Peter N. Arrowsmith and his professional organizations ("Dr. Arrowsmith").[1] Jurisdiction was based on diversity. 28 U.S.C. § 1332 (a)(1). Mr. Hanson sought damages for the complete loss of vision suffered in his left eye as a result of the negligence of respondents and as a result of their failure to obtain his informed consent for the surgery.

The case was tried to a jury with Judge John T. Nixon presiding. Prior to trial, counsel had an informal discussion with the judge in chambers concerning, among other things, jury selection. The discussion is not in the transcript of the trial because neither the parties nor the court requested the court reporter to be present. The parties strenuously disagree about what occurred during this in-chambers conference.

At trial, a panel of twenty prospective jurors was sworn. Each side was allowed to exercise six peremptory challenges so that eight jurors remained. The parties understood that the jury consisted of six regular jurors and two alternates. Alternates were not specifically designated. There is a dispute among the parties about the planned method of selection and dismissal of the alternates.

At the end of the trial, the judge directed all eight jurors to retire and deliberate in order to reach a verdict. Mr. Hanson's counsel objected and requested that

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1. Mr. Hanson's wife, Linda Hanson, was originally a plaintiff in this action, but her case was voluntarily dismissed at trial. Parkside Surgery Center was originally a defendant, but settled with Petitioner during the pendency of his appeal to the Sixth Circuit.

two jurors be struck as alternates. The judge then asked Dr. Arrowsmith's counsel whether he wanted to strike to a six member jury or to allow the case to be submitted to all eight. Dr. Arrowsmith's counsel responded that he would prefer to let all eight deliberate. Mr. Hanson's counsel again objected and requested an opportunity to strike to a six-member jury as was his understanding of the procedure set out by the court and as required by Fed. R. Civ. P. 47(b) and the local rules of the Court. The court rejected these requests, stating: "It's up to the Court. I am going to let it go to all eight." The eight-member jury then returned a verdict in favor of the defendants and judgment was entered on January 22, 1986.

Petitioner filed a motion for new trial, alleging, *inter alia*, that the trial court's refusal to dismiss two alternates and its submission of the case to eight jurors constituted reversible error. The court denied the motion. On October 8, 1986, within thirty days of that denial, Petitioner filed a Notice of Appeal to the Sixth Circuit.

On January 23, 1987, more than a year after the trial and three and one-half months after Petitioner had begun the appeal, Dr. Arrowsmith moved the district court for approval of a statement on the evidence or proceedings and for correction of the record, pursuant to Fed. R. App. P. 10. Dr. Arrowsmith sought the district court's approval of his counsel's narrative of the unreported pre-trial meeting held in chambers. Dr. Arrowsmith supported his Motion with affidavits of his attorneys. According to Dr. Arrowsmith's counsel, no one objected when in the in-chambers session, the judge stated that the parties would be allowed a peremptory challenge at the end of the trial to eliminate the alternate jurors *only if* all parties agreed.

Petitioner objected to Dr. Arrowsmith's Motion on the grounds (1) that the Motion was time barred pursuant to Fed. R. App. P. 10(b); (2) that the purpose of Fed. R. App. P. 10 is to allow parties to create a record only if they could not have obtained a transcript at the time, not to create a transcript when the parties waived their right to have a transcript; and (3) that the statements of the proceedings by Dr. Arrowsmith's counsel were inaccurate. Petitioner's objection was supported by the affidavits of his trial attorneys. Their recollection of the in-chambers conference differed significantly from the recollection of Dr. Arrowsmith's counsel. They understood that the jury was to be composed of six jurors and two alternates and that each party would exercise a peremptory challenge at the conclusion of proof so that only six jurors would deliberate. They denied that there was any discussion or understanding of allowing an eight-member jury to deliberate under any circumstances.

Despite a request for a hearing, on February 23, 1987, the trial court granted Dr. Arrowsmith's motion without a hearing and approved his counsel's statement verbatim. Petitioner objected to its inclusion in the record on appeal, and the appeal proceeded.

The Sixth Circuit affirmed the judgment. On the jury issue, the Court did not rest its decision on the issue of whether the district court's failure to dismiss the alternates violated Fed. R. Civ. P. 47(b) and the local rule, nor upon the issue of whether the court's action violated Petitioner's Seventh Amendment right to a trial by jury. Rather, the Court held that even if the district court's ruling violated these rights, that violation should be judged by the harmless error stan-

dard. Applying that standard, the Sixth Circuit found that Mr. Hanson had not been prejudiced by the action of the district court.

REASONS FOR GRANTING WRIT

This Court should grant a writ of certiorari to review the Sixth Circuit's decision because it conflicts with the decision of another federal court of appeals and involves an important federal question upon which this Court has not yet had the opportunity to rule. *See* Sup. Ct. R. 17.1. The decision directly conflicts with the Fourth Circuit's holding in *Kuykendall v. Southern Railway Co.*, 652 F.2d 391 (4th Cir. 1981). Further, it conflicts with numerous cases addressing jury selection and deliberation. Moreover, the Sixth Circuit's decision sanctions a jury selection process by district courts that violates Rule 47(b), creates uncertainty for all parties in terms of compositions of the jury, and weakens the Seventh Amendment right to a jury trial.

The Seventh Amendment and the statutes authorizing the rules of civil procedure mandate the preservation of the right of jury trial as at common law. The Federal Rules of Civil Procedure preserve that right by permitting a party to demand a jury (Rule 39), by providing a method for their examination (Rule 47(a)), by regulating the number of jurors (Rule 48) and by providing for the selection and dismissal of alternates (Rule 47(b)). Both at common law and according to the dictates of Rule 47(b), a jury is by definition not composed of alternates. To disregard the requirements of Rule 47(b) and to allow alternates to deliberate violates the sanctity of the jury process. Moreover, the sanctioning by the Sixth Circuit of procedures by district courts which de-

viate from the rules of civil procedure without express agreement of the parties threatens the right to a jury by making it subject to uncertainty and ad hoc decision-making.

The integrity of the jury process, the sanctity of the jury's proceedings, and the dynamics of its functioning are substantive parts of the constitutionally protected common law right to a trial by jury. *See, e.g., Remmer v. United States,* 350 U.S. 377, 382 (1956) ("[I]t is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made."); *United States v. Virginia Erection Corp.,* 335 F.2d 868, 872 (4th Cir. 1964) (emphasis added) ("[T]he presence of the alternate in the jury room violated the *cardinal principle* that the deliberations of the jury shall remain private and secret in every case."); *People v. Bruneman,* 4 Cal. App. 2d 75, 40-P.2d 891, 893 (1935), *quoting Goby v. Wetherill,* 2 King's Bench Div. 674 ("The principle is that the jury are entitled, and bound, to deliberate in private. If a stranger, whether an officer of the court, or not, is present for a substantial time during their deliberations, then the verdict is vitiated."); *Patten v. State,* 221 Tenn. 337, 344, 426 S.W.2d 503, 506-507 (1967), *cert. denied,* 400 U.S. 844 (1970) (holding that allowance of alternate in jury room violates traditional principles of common law right to trial by jury); *State v. Cuzick,* 85 Wash. 2d 146, 530 P.2d 288, 289 (1975) ("[T]here can be no question that [the jury] must reach its decision in private, free from outside influence. This principle is of constitutional stature.")

In *Kuykendall v. Southern Railway Co.,* 652 F.2d 391 (4th Cir. 1981), a case in essence identical to the instant

case, the Fourth Circuit held that submission of a civil case to a jury of more than six persons in the absence of a *written or clearly recorded stipulation* was *per se* error and mandated reversal and remand for a new trial. Just as in the instant case, in *Kuykendall,* the court empanelled a jury of eight without designating which two of the eight would be alternate jurors. After closing arguments, the trial court announced, out of the presence of the jury, that the case would be submitted to all eight jurors for deliberations. *Id.* at 392. Defendant's counsel objected and requested that each side be allowed an additional strike. The trial court overruled defendant's objection and submitted the case to seven jurors.[2] In reversing the trial court, the Fourth Circuit reasoned that because there was no "written" or "clearly recorded" stipulation, the jury *must be treated* as one of six regular jurors and two alternates. Therefore, under Fed. R. Civ. P. 47(b) providing that alternate jurors *shall be dismissed before the jury retires to consider its verdict,* the trial court should have dismissed two jurors. The Fourth Circuit held that the trial court's failure to do so constituted reversible error. *Id.* at 392-393; *see also DeBenedetto v. Goodyear Tire & Rubber Co.,* 754 F.2d 512 (4th Cir. 1985) (holding that silence by plaintiff's counsel to the court's statement (appearing on the record) that all eight jurors would participate in deliberation at the close of the case amounted to a clearly recorded stipulation within the meaning of *Kuykendall* and would not support a reversal of the jury's verdict.); *Seese v. Volkswagenwerk, A.G.,* 648 F.2d 833 (3rd Cir.), *cert. denied,* 454 U.S. 867 (1981) (noting

2. One juror fell ill, reducing the number of jurors from eight to seven.

that when all parties *consent*, courts have allowed alternate jurors to deliberate).

In so holding, *Kuykendall* relied upon numerous previous cases holding that allowing alternates to deliberate in a criminal trial destroyed the sanctity of the jury process and constituted *per se* error:

> In any event, the presence of the alternate in the jury room violated the cardinal principle that the deliberations of the jury shall remain private and secret in every case. The presence of any person other than the jurors to whom the case has been submitted for decision impinges upon that privacy and secrecy. It is possible that [the alternate's] presence may have operated to some extent as a restraint upon the jurors and their freedom of action and expression.

United States v. Virginia Erection Corp., 335 F.2d 868, 872 (4th Cir. 1964); *see also United States v. Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978) ("we must notice the presence of the alternate in the jury room during part of the jury's deliberations as plain error, reverse the convictions and award defendant a new trial."); *Eickmeyer v. Dunkin Donuts of America, Inc.*, 507 So. 2d 1193, 1194 (Fla. App. 1987) ("It is well-settled in Florida that fundamental, reversible error occurs wherever, as here, an alternate juror—who is considered as any other unauthorized person—is so much as present during the deliberations even though, *un*like the present case, he remains silent and contributes nothing to the result.")

Significantly, the Tennessee Supreme Court has similarly held that allowing alternates to deliberate, as the court in the present case did, constitutes immediate and reversible error:

> While it is now possible to waive a jury trial or to waive the number of jurors, no provision exists which allows additional persons within the confines of the jury deliberation. In this case it would have been possible for this additional juror to have influenced the other members of the jury without his ever being required to face the moment of truth by casting a vote. To allow the additional juror to be present in the jury room during deliberations is contrary to the common law, the principles embedded in the concept of the jury trial, and the applicable statutory provision, sec. 22-222 [state statutory provision requiring that alternates be discharged prior to submission of a case to a jury].

Patten v. State, 221 Tenn. 337, 344, 426 S.W.2d 503, 506-507 (1967), *cert. denied,* 400 U.S. 844 (1970).

The Sixth Circuit rejected *Kuykendall* and, consequently, all of these other opinions, without giving any reason for doing so. Rather, relying upon several decisions of this Court concerning the constitutionally permissible *minimum* number of jurors, it asserted that the submission of Mr. Hanson's case to a jury composed of six jurors and two alternates could not have prejudiced him (presumably under the theory that eight jurors is better than six) and, therefore, did not constitute reversible error. *See Hanson,* Appendix A, *relying upon Colgrove v. Battin,* 413 U.S. 149 (1973) (involving challenge to a local rule requiring six-person juries in all civil cases); *Ballew v. Georgia,* 435 U.S. 223 (1978) (involving challenge to state statute requiring five-person juries in criminal misdemeanor cases). In so asserting, however, the court missed the point.

The Supreme Court cases upon which it relied concern whether the right to a jury trial is denied by submission of a case to a jury of six members *or less*. The issue here is whether Mr. Hanson's right to a jury trial is infringed when an essential and substantive element of that right, the integrity of the jury proceedings, is jeopardized by the unauthorized participation of alternates in deliberations, despite his timely objections, and by the court's deviation from set rules of civil procedure without clear agreement by the parties. This is an entirely different question.

Further, as the Tenth Circuit has recognized in the criminal context, a prejudice requirement such as that the Sixth Circuit applied in this case is utterly inappropriate and unworkable:

> In these circumstances it is difficult to see how a test of 'prejudice' can be applied. The alternate was fully qualified to participate as were the others, she had been instructed with the others, and her participation can hardly be considered 'prejudicial.' Perhaps an attempt could be made to show the juror attempted to influence others by expressing an opinion or conclusion, but again this is not related to 'prejudice.' *The borrowing of a 'prejudice' standard from other constitutional situations does not seem to provide an appropriate standard or test.*
>
> *Once the prescribed number of jurors becomes 'the jury,' then, and immediately, any other persons are strangers to its proceedings. Their presence destroys the sanctity of the jury and a mistrial is necessary.*

United States v. Beasley, 464 F.2d 468, 470 (10th Cir. 1972) (emphasis added). A party will certainly never

be able to demonstrate prejudice so long as courts assume, as the Sixth Circuit did, that having more than six jurors is always better than having six jurors.[3]

Moreover, the Sixth Circuit's opinion sanctions uncertainty and ad hoc decision-making by district courts in regard to jury selection. As this Court has previously recognized, there is a need for clear delineation and certainty as to rules regarding jury composition and selection:

> Though the line separating the permissible jury practice from the impermissible may not be the brightest, a line must be drawn somewhere, and the constitutional inviolability of that border must be scrupulously respected lest the purpose and functioning of the jury be seriously impaired.

Brown v. Louisiana, 447 U.S. 323, 331 (1980) (citations omitted). Allowing a district court to deviate from the federal rules pertaining to juries without a clearly recorded stipulation violates these principles of clarity and certainty.

In subjecting a violation of Rule 47(b) to the harmless error standard, the Sixth Circuit ignored the importance of the issue with which Rule 47(b) and Local Rule 12(j) are concerned—the Seventh Amendment right to a jury. That right is an essential element of the broader right to a fair trial. Both the appearance and reality of fairness will be destroyed if trial judges can ignore these and similar rules regarding jury composi-

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3. In any event, Mr. Hanson submits that he was prejudiced. The jury that deliberated and decided his case contained two persons who, according to the rules, should not have been in the jury room. He therefore faced a burden of convincing eight, not six, people.

tion. A litigant will not know whether his case will be decided by six, eight, twelve or fourteen jurors until the judge decides at the conclusion of the proof.

The only way to prevent this uncertainty and the consequent infringement of a party's right to a trial by jury is to adopt the *Kuykendall* rule. Under that rule, only a written or clearly recorded stipulation (not an after-the-fact reconstruction of a disputed, off-the-record conversation between the parties) will allow the district court to deviate from Rule 47(b). In the absence of such, when a district court fails to follow that rule the resulting judgment must be reversed without applying an artificial and unworkable prejudice standard.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the question discussed herein.

Respectfully submitted,

STEVEN A. RILEY
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238
615/742-6200
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Steven A. Riley, a member of the Bar of the Supreme Court of the United States and counsel of record for Larry Ray, petitioner herein, hereby certify that on this the 31st day of September, 1989, the requisite number of copies of the foregoing were served upon Noel F. Stahl, CORNELIUS & COLLINS, 29th Floor, Third National Financial Center, Post Office Box 2808, Nashville, Tennessee 37219, attorneys for respondents, by United States mail, postage prepaid.

STEVEN A. RILEY
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238
615/742-6200

APPENDIX

APPENDIX A

No. 86-6089

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY RAY & LINDA HANSON,
Plaintiffs-Appellants,

v.

PARKSIDE SURGERY CENTER; PETER N. ARROWSMITH, M.D.; PETER N. ARROWSMITH, M.D., P.C.; and ARROWSMITH EYE INSTITUTE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee

Decided and Filed April 14, 1989

Before: ENGEL, Chief Judge;* MERRITT and NORRIS, Circuit Judges.

ENGEL, Chief Judge. Plaintiff Larry Ray Hanson appeals from the judgment of the United States District Court for the Middle District of Tennessee granting defendant Parkside Surgery Center's motion for a directed verdict and from a jury verdict rendered in favor of defendant Peter N. Arrowsmith, M.D. and the remaining defendants. After this appeal was filed, Parkside Sur-

*The Honorable Albert J. Engel assumed the duties of Chief Judge April 1, 1988.

gery settled with Hanson and was dismissed from the case. Hanson's claims with regard to the other defendants remain before us.

Hanson asserts that the district court committed six reversible errors in conducting the trial: (1) seating an eight-member jury, with all eight members deliberating; (2) restricting the testimony of plaintiff's expert, Dr. Denis O'Day; (3) excluding the deposition testimony of Dr. John M. Omahundro, III; (4) disallowing evidence of Dr. Arrowsmith's revised informed consent form; (5) failing to allow plaintiff's counsel to cross-examine Dr. Arrowsmith concerning statements attributed to him contained in a newspaper article; and (6) failing to allow plaintiff's counsel to admit into evidence the informed consent form used by plaintiff's expert.

The most important issue raised by plaintiff, in our judgment, is whether it was reversible error under the circumstances here for the trial court to have submitted the case to the unanimous decision of eight, as contrasted to six, jurors. After reviewing the briefs and record and hearing oral argument, and despite reservations about the manner in which the jury was seated, we reject all of Hanson's claims of error and affirm.

In 1983, Larry Hanson, a resident of Alabama, learned of an experimental/investigative eye surgery called radial keratotomy which reduces nearsightedness by changing the shape of the cornea. The procedure has been done by Dr. Arrowsmith in Nashville, Tennessee since 1981. Mr. Hanson visited Arrowsmith's office in Nashville, spoke with Arrowsmith concerning the procedure, and watched a video tape prepared by Arrowsmith as part of the informed consent process. Mr. Hanson elected

to have the surgery and signed Dr. Arrowsmith's and Parkside Surgery's informed consent forms, but during the anesthesia process (the anesthesia was administered with a sharp-tipped rather than a blunt-tipped needle, a medical decision, the validity of which is also in dispute), Hanson's optic nerve was damaged and he was rendered blind in his left eye.

The Hansons timely filed a medical malpractice suit invoking the diversity jurisdiction of the United States District Court for the Middle District of Tennessee alleging negligence in the anesthesia process. They further alleged that defendants had failed to obtain Hanson's informed consent. The case was tried before a jury, and Tennessee's malpractice statutes were applied. During trial and before the jury began its deliberations, plaintiff Linda Hanson dismissed her claims. A directed verdict subsequently was rendered for Parkside, and the jury returned a verdict for defendant Arrowsmith. Larry Hanson filed a motion for new trial pursuant to Fed. R. Civ. P. 59(a). His motion was denied. Shortly thereafter, he filed a motion for reconsideration of that order. While that motion was pending, he also filed a notice of appeal. Following a change in counsel, Hanson filed a motion to stay all proceedings pending a determination of the effectiveness of the notice of appeal or, in the alternative to file a supplemental brief. The trial court decided that it would not rule on the plaintiff's motion to reconsider pending the outcome of the issue in this court.

On January 23, 1987, pursuant to Fed. R. App. P. 10, defendant Arrowsmith filed a motion in the district court for approval of a statement on the evidence or proceedings and for correction of the record with regard to the

contents of an unreported pre-trial meeting held in chambers during which the manner of selection and the size of the jury was discussed. Over plaintiff's motion in opposition, the district court granted Arrowsmith's motion and approved his statement on the evidence or proceedings. The statement set out the jury selection process as it was described by the district court to all counsel at the pre-trial conference:

> twenty jurors would be brought to the courtroom and placed in the jury box and in a row of seats in front of the box. During voir dire plaintiffs would be allowed six peremptory challenges and the defendants would be allowed six peremptory challenges between them. After all twelve challenges had been exercised a jury of eight persons would be sworn and seated and no alternate jurors would be specifically designated. The case would then be tried to all eight jurors. At the end of the trial if both sides agreed to excuse two of the jurors then each side would select one juror who would be dismissed and the remaining jury of six persons would retire to deliberate. If both sides did not agree to excuse two jurors at the end of the trial, then the case would be submitted to a jury of eight.[1]

The statement also indicated that all counsel had an opportunity to ask the district court questions about the procedure and that they expressed their understanding

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1. Since no jurors were excused we need not decide whether permitting additional strikes after each side has presented its case and observed the reaction of individual jurors would be appropriate even by stipulation. However, it has been suggested that the practice appears to be "subversive of the truth-seeking purpose of the jury process." *Kuykendall v. Southern Railway*, 652 F.2d 391, 392 (4th Cir. 1981). No claim is made that any juror was subject to challenge for cause.

of and agreement "with the manner of jury selection and the number of jurors who would hear the case."[2] The plaintiff continues to challenge the propriety of the district court's decision to approve the statement and to question its accuracy.

Plaintiff first claims that the district court committed reversible error by submitting the case for deliberation, over plaintiff's objection, to an eight-member jury in violation of Fed. R. Civ. P. 47(b) and Rule 12(j) of the Local Rules of the Court for the Middle District of Tennessee. In relevant part, Rule 47(b) provides "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Local Rule 12(j) provides "[a]ll civil juries shall be composed of six (6) persons, excluding alternates." Relying primarily on *Kuykendall v. Southern Railway, supra*, plaintiff argues that both of these rules are "mandatory," and therefore absent a valid stipulation by the parties, as provided for in Fed. R. Civ. P. 48, for an eight-member jury, the district court's failure to discharge two jurors as alternates in this case is grounds for reversal.[3] *See also DeBenedetto v. Goodyear Tire*

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2. No express reason is given for this agreement, nor is any potential or actual prejudice suggested. The most logical explanation is that it simply made no difference to the parties. When jurors have sat together in hearing a case they often develop friendships and a natural desire to see it through to the end. Consequently jurors who are excused before the rest retire are often disappointed, and even frustrated by a feeling that their participation turned out to be useless in the end. Counsel, sensing this, may be reluctant to risk the displeasure of the jury by suggesting a reduction in the size, especially when there is no perceived advantage to their clients in doing so.

3. Fed. R. Civ. P. 48 provides:

> The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as a verdict or finding of the jury.

& *Rubber Co.*, 754 F.2d 512 (4th Cir. 1985). Defendants counter by arguing that because no substantial right was affected, the claimed violations of Rule 47(b) and Local Rule 12(j) in this case do not merit a new trial, and moreover, because plaintiff agreed to the procedure followed at trial, albeit during a conference that took place off the record, he waived the right to object to any violation of either of the rules. We conclude that Fed. R. Civ. P. 48 does not preclude a stipulation such as that found by the district court.[4] Likewise we find that the local rule does not preclude waiver by a stipulation entered into pursuant to Rule 48.

In *Kuykendall v. Southern Railway, supra,* as in this case, the trial court empaneled an eight-member jury without designating two members as alternates. After closing arguments, the court announced, out of the presence of the jury, that the case would be submitted to the eight jurors, all of whom would participate in the deliberations. The defendants objected, relying on a local rule requiring the trial judge to submit the case to a jury of either six or twelve, but the objection was overruled. Because one of the eight jurors was excused for illness, the case was eventually submitted to the remaining seven. Borrowing from its cases addressing similar situations under Fed. R. Crim. P. 24(c), the analogous rule of criminal procedure, the court of appeals

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4. In reaching this decision we reject plaintiff's overly restrictive reading of Fed. R. App. P. 10 and find the district court's statement on the evidence or proceedings is properly before us pursuant to Fed. R. App. P. 10(e). *Cf. Cox v. General Electric Co.*, 302 F.2d 389 (6th Cir. 1962) (applying predecessor to Rule 10(e)); *S & E Shipping Corp. v. Chesapeake & Ohio Railway*, 678 F.2d 636 (6th Cir. 1982); *United States v. Page*, 661 F.2d 1080 (5th Cir. 1981). *See generally* 9 Moore, Ward & Lucas, *Moore's Federal Practice* ¶¶ 210.06[3], 210.08 (2d ed. 1988).

adopted a "per se rule of reversal" for civil cases where an alternate juror is allowed to retire with the jury in violation of Rule 47(b). It therefore reversed and remanded the case for a new trial. *Id.* at 393. Although no alternates had been designated, the Fourth Circuit reasoned that since there was no "written" or "clearly recorded" stipulation pursuant to Rule 48 the jury must be treated as one of six regular jurors and two alternates. *Id.* at 392-93. The effect of this designation was to bring the jury within the mandate of Rule 47(b).

While the Fourth Circuit was within its superintending authority in holding that a departure from the authorized jury size in civil cases is permitted only "by a written stipulation or one clearly recorded," *DeBenedetto,* 754 F.2d at 514; *Kuykendall,* 652 F.2d at 392, we decline to adopt such a per se rule here. Moreover, assuming that Rule 47(b) and that Local Rule 12(j) may have been violated, we still believe such violations are subject to the application of the harmless error standards of Fed. R. Civ. P. 61. *Cf. United States v. Levesque,* 681 F.2d 75, 80 (1st Cir. 1982) (violation of Fed. R. Crim. P. 24 warrants reversal only where irregularity affects substantial rights).

The Supreme Court has noted that, for purposes of the seventh amendment, what is required for a jury is "a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross-section of the community." *Colgrove v. Battin,* 413 U.S. 149, 160 n.16 (1973). In *Colgrove,* the Court rejected a seventh amendment challenge to a local rule of the United States District Court for the District of Montana which provided for trial of all civil cases before a jury of six instead of the traditional twelve. In reach-

ing its decision, the Court relied upon its prior decision in *Williams v. Florida,* 399 U.S. 78 (1970) (upholding, against a sixth and fourteenth amendment challenge, the use of a six-member jury in a state criminal trial), and stated:

> Keeping in mind the purpose of a jury trial in criminal cases to prevent government oppression, . . . and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues, . . . the question comes down to whether jury performance is a function of jury size. In *Williams,* we rejected the notion that "the reliability of the jury as a fact-finder . . . [is] a function of its size," . . . and nothing has been suggested to lead us to alter that conclusion.

413 U.S. at 157 (citations omitted).

Later, in *Ballew v. Georgia,* 435 U.S. 223 (1978), Justice Blackmun, joined by Justice Stevens, commented upon a series of studies considering the efficacy of juries composed of fewer than twelve jurors and observed:

> the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members. We readily admit that we do not pretend to discern a clear line between six members and five. But the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decision-making, that causes untoward differences in verdicts,

> and that prevents juries from truly representing their communities, attains constitutional significance.

Id. at 239. For differing reasons, the remaining seven justices concurred in Justice Blackmun's conclusion that a five person jury in a criminal trial does not satisfy the jury trial guarantees of the sixth and fourteenth amendments. *Id.* at 245-46.

Ballew, of course involved a criminal trial. However, results of the studies reviewed therein suggest at least that a civil jury composed of fewer than six members may also run afoul of the seventh amendment requirements set out in *Colgrove,* but we need not resolve that question here. On the contrary, the studies cited by Justice Blackmun in *Ballew* suggest, if anything, *increased* reliability where juries, such as the one involved in this case, consist of more than six jurors. *See Ballew,* 435 U.S. at 232-239. Since plaintiff makes no claim that the jury was wrongfully influenced in any way during its deliberations or that the two "extra" jurors were incompetent or unqualified, we must conclude that no right was violated and therefore that no reversible error occurred despite the departure from authorized jury size.

We also find that none of plaintiff's five other claims of error merits a new trial.

Plaintiff argues that the district court erred by restricting his expert witness' testimony on the issue of informed consent. As a result, plaintiff claims, his expert was not permitted to testify that Dr. Arrowsmith's video tape, prepared as part of the informed consent process and viewed by plaintiff, improperly minimized the risks involved in the procedure in order to induce plaintiff's consent. The district court permitted Dr. O'Day

to state what information he believed Dr. Arrowsmith had failed to include in the video tape, but did not permit him to testify concerning his belief that the tape presented the risks involved in the procedure in a "persuasive" manner. Basing its decision, in part, on its understanding of Tennessee law and its belief that Dr. O'Day's area of expertise did not include "communications," the district court concluded that Dr. O'Day's testimony concerning the manner in which the information was presented would not assist the jury, which could see and evaluate the video tape on its own. Since the decision to allow expert testimony, pursuant to Fed. R. Civ. P. 702, is largely within the discretion of the trial court, we will disturb the trial court's ruling only if it is clearly erroneous or an abuse of discretion. *See, e.g., Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 919 (6th Cir. 1984). *See also Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1208 (6th Cir. 1984) (four part test must be met to uphold the admission of expert testimony). Applying these standards we hold that the district court did not abuse its discretion in this case.[5]

Plaintiff next argues that the district court erred in denying his request to admit the deposition testimony of Dr. John M. Omahundro, III, pursuant to Fed. R. Civ. P. 32(a)(3)(D). On the facts of this case, especially in light of evidence that plaintiff's inability to procure

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5. After oral argument was heard in this case, our court addressed but did not decide the question of the relationship of Fed. R. Evid. 601 ("General Rule of Competency") and Fed. R. Evid. 702 ("Testimony by Experts") where a state's statute provides that certain individuals are incompetent to testify as experts. *Ward v. United States*, 838 F.2d 182, 188-89 (6th Cir. 1988) (applying Tennessee malpractice statutes in action under Federal Tort Claims Act). Because neither party has raised the issue of Dr. O'Day's competency as an expert, we again decline to consider that question.

the witness' attendance at trial was at least in part due to plaintiff's own lack of diligence, we do not find that the district court abused its discretion.

Plaintiff also raises the claim that the district court erred in disallowing evidence of Dr. Arrowsmith's revised informed consent form. Dr. Arrowsmith began using the form approximately two years after plaintiff's surgery. We find no error in the district court's ruling pursuant to Fed. R. Evid. 407 because the record simply does not support plaintiff's assertion that, by Dr. Arrowsmith's own admission, the revised consent form is not a subsequent remedial measure. *Cf. Bauman v. Volkswagenwerk A.G.*, 621 F.2d 230, 232-33 (6th Cir. 1980).

Plaintiff next argues that the district court erred in not allowing plaintiff's counsel to cross-examine Dr. Arrowsmith concerning statements attributed to him contained in a newspaper article. We disagree. After reviewing the record in this case we believe the district court acted within its discretion when it excluded this unfairly prejudicial and misleading evidence pursuant to Fed. R. Evid. 403. *Cf. All American Life and Casualty Co. v. Oceanic Trade Alliance Council International Inc.*, 756 F.2d 474, 479 (6th Cir. 1985).

Finally, plaintiff argues that the district court erred by failing to allow plaintiff's counsel to admit into evidence the informed consent form used by plaintiff's expert. The form was prepared by Dr. O'Day to inform patients of the risks involved in a different type of eye surgery. We again find that the district court did not abuse its discretion.

Accordingly, the judgment of the district court is AFFIRMED.